Supreme Court of the United States.

October Term, 1922.

No. 210.

FOX FILM CORPORATION,

Petitioner,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONER'S BRIEF.

Saml. E. Rogers,
Attorney for Petitioner.

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To be argued by
SAUL E. ROGERS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court (Record page 28, fols. 64-69) from a decree of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Eastern District of New York dismissing the petitioner's bill of complaint upon a motion to dismiss under

equity rule 29, in an action for infringement of the dramatic copyright of the poems entitled "OVER THE HILL TO THE POORHOUSE" and OVER THE HILL FROM THE POORHOUSE."

Statement of the Case.

The allegations of the bill of complaint were as follows:

Prior to 1873 Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor House" and another "Over the Hill From the Poor House" (Rec. page 1, fol. 3). Carleton assigned his interest in the poems and collection, together with the right to secure copyrights thereon to Harper & Bro., publishers. On February 21, 1873 said assignees duly copyrighted said collection of poems and published the same under the title of "Farm Ballads" (Rec. p. 2, fols. 3-5).

On January 7, 1901, and within one year of the expiration of the copyrights assigned to Harper & Bro., Carleton, as author, applied for and obtained a renewal of said copyrights. The expiration of this renewal was February 21, 1915 (Rec. pp. 2-3, fol. 5).

Carleton died December 18, 1912, leaving neither wife nor children surviving him and leaving a will wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters Testamentary were issued to Goodrich in Kings County, New York, on March 21, 1913 (Rec. p. 3, fol. 6).

On January 21, 1915, Goodrich, as executor of the will of Carleton, duly filed an application for the renewal of said copyright (Rec. p. 3, fol.

6), and which renewal, expiring February 21, 1929, was duly registered by the Register of Copyrights. All the various publications of the said collection of poems were suitably inscribed in accordance with the Copyright Law (Rec. p. 2, fol. 4).

On July 27, 1915, Norman E. Goodrich died, leaving a will in which he granted and devised all his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated and Mrs. Goodrich qualified thereunder. By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to the petitioner Fox Film Corporation for a valuable consideration the sole dramatic copyrights of the above named poems with the exclusive right to dramatize the same for production throughout the world.

These poems were capable of being dramatized and lent themselves to the making of a practical and effective stage drama based on their plot and theme. Respondents in violation and in infringement of the petitioner's dramatic copyrights, purchased as aforesaid, gave public performances of a play entitled "Over the Hill to the Poor House" on October 25, 1920, and thereafter, which play was based in whole or in part on the theme, plot and action of said poems (Rec. p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

Several of the defendants, after interposing answers, made a motion to dismiss the bill of complaint pursuant to equity rule 29. The District Court granted the motion to dismiss on the ground that the petitioner and its predecessors in title Alice L. Goodrich and Norman E. Goodrich obtained no renewal of the copyright of the aforesaid poems, because Norman E. Goodrich Will Carleton's executor, had no right to apply

for a further renewal from February 21, 1915, the date of the expiration of the author's first renewal copyright, *because said author died in* 1912 *and not within one year prior to February* 21, 1915 (Rec. pp. 13-15, fols. 30-34).

The District Court held that the widow, children and next-of-kin of the author would have the right to obtain renewal of the copyright, regardless of the time of death of the author prior to the expiration thereof, so long as their renewal application was filed within one year from the expiration of the copyright; but held, notwithstanding the language of the Statute to the contrary, that an executor would not be entiled to apply for such renewal nor would the legatees under the Will be entitled to the benefits of such renewal term unless the death of the author occurred within one year prior to the expiration of the copyright.

The decision of the District Court purported to follow *Silverman* v. *Sunrise Pictures Corporation* (273 Fed., 909) decided by the Circuit Court of Appeals for the Second Circuit.

In another action involving the same copyright involved herein brought about the same time in the District Court for the Southern District of New York and on a similar motion to dismiss the District Court, in that case, made a similar decision, and by a final decree dismissed the bill of complaint (*Fox Film Corporation* v. *Knowles, et al.*, 275 Fed., 852), which action has been also brought up for review pursuant to a writ of certiorari.

Appeals from both cases were taken to the United States Circuit Court of Appeals, and by agreement of counsel were submitted and argued simultaneously. The Circuit Court of Appeals

affirmed the said final decrees of the District Court in a memorandum decision, basing its affirmance solely upon the prior decision in *Silverman* v. *Sunrise Pictures Corporation*, supra (Record p. 26, fol. 60).

POINT I.

Section 24 of the Copyright Act of 1909, the construction of which is involved on this appeal, permits the author in the absence of his widow or children to bequeath by will to an executor the absolute right to apply for a renewal of the copyright, and grants to the executor precedence over the next-of-kin.

There appears to be no ambiguity in Section 24 of the Copyright Law of 1909 with respect to the privilege of an author to bequeath by will to an executor the absolute right, in the absence of the other persons named in the statute, the widow or children, to apply for and obtain a renewal of the copyright. For convenience we set forth the pertinent part of Section 24:

> "That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or chil-

> dren of the author, if the author be not living, or if such author, widow or widower, or children be not living, then by the author's executors, or in the absence of a will, his next-of-kin, for a further period such that the entire term shall be equal to that secured by this act including the renewal period: * * * Provided, that application for such renewal and extension shall be made to the Copyright Office and to the register therein within one year prior to the expiration of the existing term."

(Section 24 of the Copyright Act of March 5th, 1909, 35 Stats., Part 1, p. 1080.)

Considerable enlightenment of the legislative intent in enacting said section is contained in the House Committee Report, Number 2222, 60th Congress on the bill afterwards enacted into the Copyright Law of 1909. After referring generally to the wisdom of a renewal of the term of a copyright, the report reads:

> "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right." * * *

> "Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the

widow, widower, or children of the author, if the author, be not living, or if such author, widow, widower, or children be not living, *then the author's executors, or in the absence of a will, his next-of-kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.*" (Italics ours.)

Under the clear and unequivocal provisions of the Act and the further explanation by the above Committee Report it is almost incomprehensible how the Circuit Court of Appeals could interpret this statute by reading into the Act any condition or qualification of the absolute privilege of an author in the absence of his widow or children to bequeath by will the right to his executors to make an application for a renewal of the copyright.

The instant case disclosed a situation where this plain and simple construction should have been followed, as was alleged in the bill of complaint. The original copyright procured by Harper & Bro. expired in 1901. The author properly procured a renewal thereof from 1901 to 1915. The author died in 1912 without a widow or children, leaving as his executor and sole legatee one Norman E. Goodrich. The executor duly qualified and as such executor, within a year prior to the expiration of Will Carleton's copyright in 1915, duly made his application for a renewal thereof, and the Register of Copyrights registered such renewal from 1915 to 1929. By operation of law the said executor, who was also the sole legatee, received the benefit of such further renewal copyright, and

when he died on July 27, 1915, he had the absolute right to bequeath by will his property, which included the said renewal, to his widow Alice L. Goodrich, from whom the petitioner received its title to the dramatic copyright by an assignment duly executed on October 26, 1920. The chain of title is perfect and complete, and in accordance with the only possible construction of Section 24 of the Act, the petitioner, acquired by assignment, the renewal of the copyright which expires on February 21, 1929. The Bill of Complaint therefore alleges a good cause of action and it was error to dismiss the same.

POINT II.

The proposition of law upon which the instant case was decided, and as also contained in the case of *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed., 909, to wit: "That the right or duty of an executor to make an application for the renewal of a copyright exists only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease," is unsound and is not in accordance with the legislative intent.

The decision holding the renewal copyright invalid in the case at bar is based upon the

proposition held by the District Court and the Circuit Court of Appeals in the case at bar and in the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* to the effect that in the absence of the author's widow or children, the executor has no right to make an application for a renewal unless the power or privilege of obtaining such renewal was in existence in the testator-author at the moment of decease; that is to say, the author must have died within one year prior to the expiration of his or the prior copyright.

We have been unable to find any authority, nor do we believe there is any adjudicated case, with the exception of the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* and the instant case, construing the act in any such manner.

Prior to 1831 in the various copyright acts then in force the right of renewal was given to an author, his executors, administrators, and assigns, and under the specific language of those statutes it was determined in the case of *Paige* v. *Banks,* 13 Wall. (80 U. S., 608), that an author who had assigned all his right, title and interest in and to a literary property thereby also impliedly assigned the right of renewal.

In 1831 the law was amended by eliminating the word "Assigns" from the statute and making the provision with respect to the renewal of copyrights substantially the same as contained in Section 24 of the present Copyright Act of 1909.

The case of *White-Smith Music Publishing Co.* v. *Goff,* 187 Fed., 247, affirming 180 Fed., 256 decided in 1911, and construing Section 24 of the Copyright Act of 1909, we believe correctly held that the case of *Paige* v. *Banks, supra,* was no longer applicable to the present statute and such

case established the proposition that an author or composer by assigning all his rights in and to a musical or literary work did not and could not assign the right of renewal; that such renewal right was *eo nomine* and limited strictly to the persons mentioned in the statute. In its discussion of Section 24 the Court gives a careful, learned and exhaustive opinion with reference to the general purport and effect of the renewal provisions of the Act, and in discussing the rights of executors under said statute says as follows (p. 251):

> "In every Act since that of 1831 this method of vesting the right to an extension *eo nomine* has been persisted in. The purpose of these provisions is singularly illustrated by the fact that all the author's administrators are shut out; but his executors who he may appoint at his will are let in."

That case, we believe, correctly establishes in theory at least that the renewal of a copyright is not truly an extension of an existing right, but is the creation of a new right derived only from the statutes and limited to the persons mentioned therein and in their order, providing proper application is made by the persons entitled to same for such renewal. No limitations or conditions are mentioned therein as to the right of executors to make application for a renewal of a copyright in the absence of the author's widow or children, and it would appear from that decision, although the precise quesiton was not adjudicated, that if there were no widow or children the executor, being the next

person mentioned in the statute, would have the absolute prior right to apply for such renewal and obtain the benefits thereof necessarily in trust for the legatees named in the author's will.

It is difficult to understand how the learned District Court and the learned Circuit Court of Appeals in the instant case and in the case of *Silverman* vs. *Sunrise Pictures Corporation, supra,* established the proposition that an executor could not make an application for a renewal of the copyright unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of his decease, *i. e.*, that it was dependent on the accident of the time of the author's death.

The facts in the *Silverman case* were entirely different from the facts in the instant case. In the *Silverman case* no application was made by the executor for a renewal of the copyright within the year prior to the expiration of the author's copyright. He had been discharged and ceased to function and had failed to make such application. An application, however, was made within the year prior to the expiration of the copyright by some of the next-of-kin and the learned Circuit Court of Appeals in the *Silverman case* held that the next-of-kin had obtained a valid copyright.

We are not concerned with any of the propositions discussed and litigated in the *Silverman case* except in one proposition stated by the Court to be as follows at page 913:

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privi-

lege of obtaining renewal was existing in the testator-author at the moment of decease."

This proposition was followed by the learned Circuit Court of Appeals in its affirmance of the decree of the District Court in the instant case.

It is very difficult to follow the reasoning of the learned Circuit Court of Appeals in arriving at this interpretation of the statute. It is submitted that there is nothing in the act or in the design or purpose thereof as expressed by the report of the Committee of the House of Representatives heretofore set forth or in the case of *White-Smith Music Publishing Co.* v. *Goff*, *supra*, interpreting generally said statute, to warrant, we believe, any such interpretation with respect to the rights of executors to apply for a renewal of a copyright.

That a misapprehension and confusion of the entire subject has arisen, is evidenced by the following excerpts from the opinion of the learned Circuit Court of Appeals in the *Silverman case*. The Court, at page 913, says:

> "It is plain from the language of the Act and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated— a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right *eo nomine*, which is

exactly what the statute was designed to prevent."

The Court in that paragraph was discussing only the absolute rights of the widow or children to apply for a renewal of the copyright and that the author could not grant to his publisher the right to obtain the renewal and thereby deprive his widow or children of that right. No mention is made of the author's executors and up to this point the law expressed therein is undoubtedly correct, because in any event in accordance with the statute, if there were a widow or children, the executor would never have any right to renew a copyright. The Court then continuing in its opinion, says, on page 913:

"But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

"If however, the author lives to within the statutory year he may certainly exercise his right, assign it or bequeath it; and if he dies in the year, but before registration, it is for his executors to function. They would receive the renewal as do the executors of an inventor dying after application and before issue of patent, who, 'in the absence of context to the contrary' take 'in trust for the next of kin' (*De La Vergne & Co.* v. *Featherstone,* 147 U. S., at 222.) In this case had Mrs. Wilson died within the year her executors would have found 'con-

text to the contrary', and would have acquired copyright for the residuary legatees as such."

We think that the comparison stated by the Court between the rights which may not be assigned under Section 24 of the Copyright Law and the rights that may be bequeathed are not correctly placed on the same level, nor are they at all comparable. While it is true "What may be assigned can ordinarily be devised", it does not necessarily follow that the rights are governed by the same procedure or principles. In other words, while it is true that provision for the assignment of a renewal term has been specifically excluded from the present statute before the right to accrual of the renewal estate yet this statute specifically permits the author to bequeath the right to make application for the renewal term, provided that no widow or children survive. The learned Circuit Court of Appeals in construing the statute in the *Silverman case* treated executors as though they were not specifically mentioned in the statute or as though they had been specifically excluded in the same manner that "Assigns" had previously been stricken from the Act of 1831, and the subsequent acts.

In view of the fact, however, that the statute specifically provides that the right to renewal may be bequeathed to executors necessarily to be held in trust for the benefit of the legatees, and inasmuch as the statute gives such executor precedence over the next of kin, there seems to be no reason why the learned Circuit Court of Appeals should strip the executors of the specific rights granted by the statute, except upon the

happening of an event not named in the statute, that is, the death of the author within one year prior to expiration of his copyright.

POINT III.

The comparison by the Circuit Court of Appeals in the *Silverman case* to the granting of a patent to the executor or administrator after application for a patent has been made is not at all similar to the situation in the instant case.

The comparison by the Circuit Court of Appeals to the patent laws is in no sense analogous. The Court refers to the case of *De La Vergne Co.* vs. *Featherstone,* 147 U. S., 222.

In that case an entirely different situation existed. It is provided by Section 4896 of the Revised Statutes that whenever a person makes application for letters patent and dies before their issuance, as follows:

> "When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the

heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath of affirmation required to be made shall be so varied in form that it can be made by them."

Under this section, and which was the one referred to in the case of *De La Vergne* v. *Featherstone, supra,* if the inventor dies before his letters patent are granted his executors or administrators may obtain the final letters patent. The right of the executors or administrators to succeed the inventor in trust for the heirs at law in the event of his death, pending grant of letters patent, is specifically granted by the Patent Laws, and in that respect the Courts strictly and religiously adhere to the language of the statute. In the case at bar and in *Silverman* vs. *Sunrise Pictures Corporation, supra,* in spite of the fact that the statute grants rights to executors to apply for a renewal the Circuit Court of Appeals has made an interpretation which entirely eliminates the statutory intent.

POINT IV.

If the interpretation in the instant case and *Silverman case* is correct with reference to the executor's right to obtain a renewal, the same interpretation should be made with respect to the other persons and classes mentioned in the statute.

If the proposition advanced in the *Silverman case* and in the instant case with reference to executors must be followed, to wit, that the right to apply for a renewal of the copyright exists only when the author died within one year prior to the expiration of his copyright, then the rule must be similarly and consistently applied to the widow and children and next of kin of the author; otherwise the entire structure falls. If the executor has no capacity to apply for the renewal term unless that right came into being and was in existence at the time of the death of the testator, then it must equally follow that the widow and children could not apply for the renewal term unless the decedent likewise died within one year prior to the expiration of the original copyright term, and similar reasoning should certainly apply to the next-of-kin, because they are the last class mentioned in the statute and their rights are only to be asserted under the statute in the absence of all the other classes surviving the author.

The reasons for the decision in the *Silverman case* and in the present case that executors do not acquire any renewal rignts until the beginning of the year last preceding the expiration of the copyright, either apply with equal force to the widow and children of the author and prevent these classes of persons from acquiring any renewal rights unless through the accident of the author's death within the prescribed year; or the reasons for these decisions are not sufficient to deprive executors situated as in the present case, of these rights. In the *Silverman case* the court said:

> "* * * We construe the section as vesting the right in, or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

If this be true of executors it is equally true of the widow of the author or his children. The court then continues:

> "It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary absence of a will in respect of this right, which only came into existence some five years after the testatrix died."

If this renewal right is not capable of passing by will to the executors unless within the prescribed year, neither does it pass to the widow or the children of the author, and it follows that these persons likewise have no rights unless death occurs within a year prior to the expira-

tion of the copyright. In spite of this fact, however, the court bases its decision that a testator-author cannot devise his renewal rights unless within the prescribed year upon the reason, quoted again from the *Silverman case* that:

> "The author cannot take away the rights of widow, children, before the opening of the last year of original copyright."

Logically, as seen above, this argument is without force for the reason that widow and children, being on a par in the wording of the statute with executors, have no greater rights than executors have within the meaning of this decision until the beginning of the prescribed year. If, to these arguments, it be answered that the widow and children receive the right to renewal not in any way through the author but by a pure statutory grant upon the beginning of the year, it may be answered that executors being enumerated with widows and children in the statute, likewise receive the renewal rights at the prescribed time, the only condition being that the widow and children are preferred in their order. The decision in the *Silverman case* and in the present case, in the end, comes to this:

> (1) Either, executors along with the widows and children of authors have an inchoate right to renewal upon the death of the author, which right, however, can only be exercised at the beginning of the prescribed year, or;
>
> (2) Executors as well as the other classes enumerated receive renewal rights by statutory grant at the beginning of the year prior to the expiration of the copyright, or;

(3) Congress, in its zeal to secure to authors, their widows, and children the benefit of renewal rights, has enacted a statute which will operate to deprive them entirely of these rights unless upon the accident of the author dying within the year preceding the expiration of the copyright.

It follows logically from the above that the only proper construction of Sec. 24 of the Copyright Act is that which, following the plain language of the statute itself, gives to widows and children of authors, or if they are not living, to the executor of the author a renewal right at the time of his death, even though by a proviso in Section 24, this right cannot be exercised until the beginning of the year previous to the expiration of the copyright.

POINT V.

It is respectfully submitted that the correct interpretation of Section 24 of the Copyright Act requires a reversal of the decree of the Circuit Court of Appeals and the District Court dismissing the bill of complaint; that such decrees be set aside and vacated with costs.

Respectfully submitted,

SAUL E. ROGERS,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1922.

No. 311

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against

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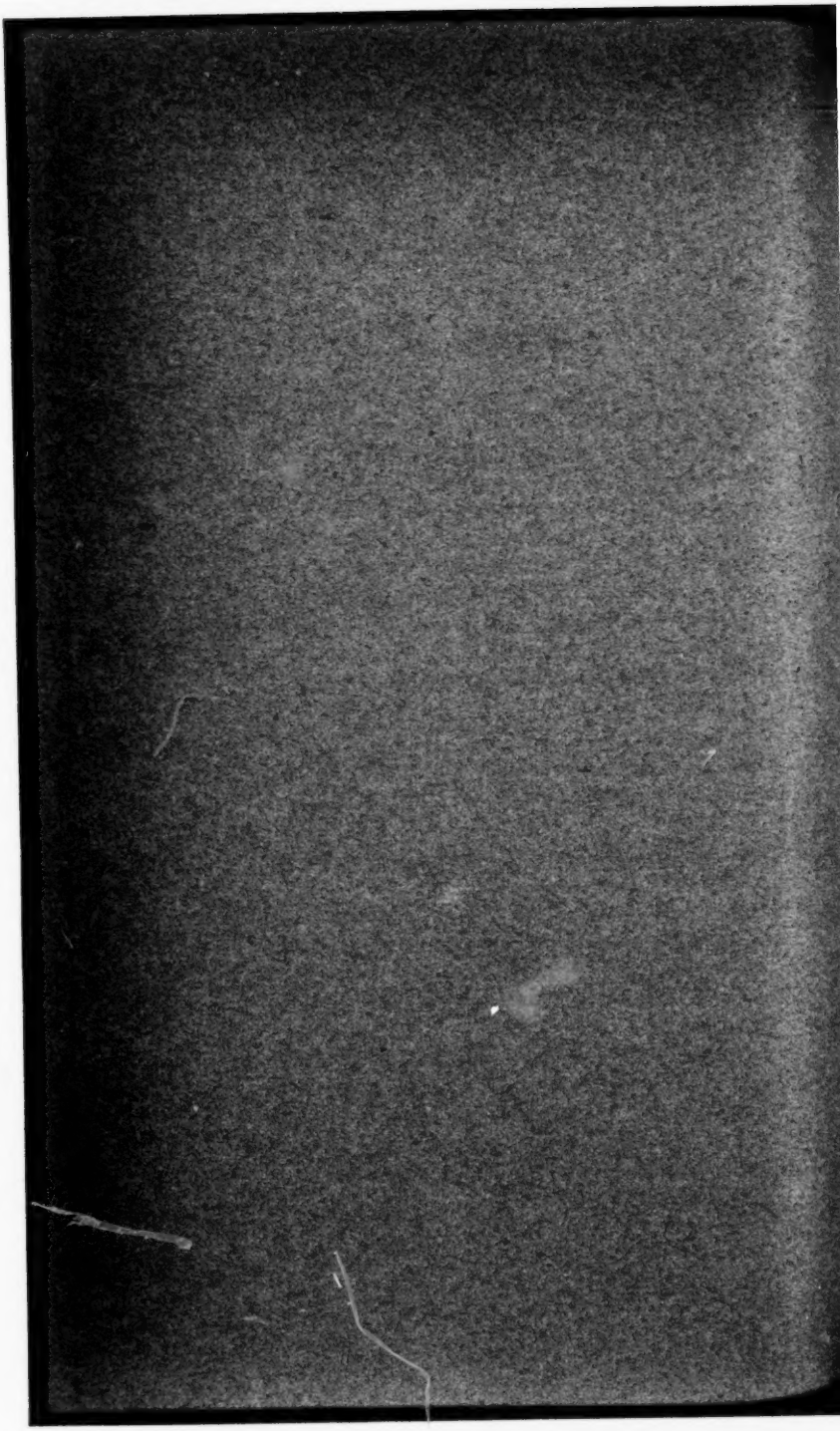
Louis D. Frohman,
Attorney for Petitioner.



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SAUL E. ROGERS.

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The allegations of the bill of complaint were as follows:

Prior to 1873 Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor House" and another "Over the Hill From the Poor House" (Rec. page 1, fol. 3). Carleton assigned his interest in the poems and collection, together with the right to secure copyrights thereon to Harper & Bro., publishers. On February 21, 1873 said assignees duly copyrighted said collection of poems and published the same under the title of "Farm Ballads" (Rec. p. 2, fols. 3-5).

On January 7, 1901, and within one year of the expiration of the copyrights assigned to Harper & Bro., Carleton, as author, applied for and obtained a renewal of said copyrights. The expiration of this renewal was February 21, 1915 (Rec. pp. 2-3, fol. 5).

Carleton died December 18, 1912, leaving neither wife nor children surviving him and leaving a will wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters Testamentary were issued to Goodrich in Kings County, New York, on March 21, 1913 (Rec. p. 3, fol. 6).

On January 21, 1915, Goodrich, as executor of the will of Carleton, duly filed an application for the renewal of said copyright (Rec. p. 3, fol.

6), and which renewal, expiring February 21, 1929, was duly registered by the Register of Copyrights. All the various publications of the said collection of poems were suitably inscribed in accordance with the Copyright Law (Rec. p. 2, fol. 4).

On July 27, 1915, Norman E. Goodrich died, leaving a will in which he granted and devised all his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated and Mrs. Goodrich qualified thereunder. By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to the petitioner Fox Film Corporation for a valuable consideration the sole dramatic copyrights of the above named poems with the exclusive right to dramatize the same for production throughout the world.

These poems were capable of being dramatized and lent themselves to the making of a practical and effective stage drama based on their plot and theme. Respondents in violation and in infringement of the petitioner's dramatic copyrights, purchased as aforesaid, gave public performances of a play entitled "Over the Hill to the Poor House" on October 25, 1920, and thereafter, which play was based in whole or in part on the theme, plot and action of said poems (Rec. p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

Several of the defendants, after interposing answers, made a motion to dismiss the bill of complaint pursuant to equity rule 29. The District Court granted the motion to dismiss on the ground that the petitioner and its predecessors in title Alice L. Goodrich and Norman E. Goodrich obtained no renewal of the copyright of the aforesaid poems, because Norman E. Goodrich Will Carleton's executor, had no right to apply

for a further renewal from February 21, 1915, the date of the expiration of the author's first renewal copyright, *because said author died in* 1912 *and not within one year prior to February* 21, 1915 (Record pp. 10-13, fols. 24-29).

The District Court held that the widow, children and next-of-kin of the author would have the right to obtain renewal of the copyright, regardless of the time of death of the author prior to the expiration thereof, so long as their renewal application was filed within one year from the expiration of the copyright; but held, notwithstanding the language of the Statute to the contrary, that an executor would not be entiled to apply for such renewal nor would the legatees under the Will be entitled to the benefits of such renewal term unless the death of the author occurred within one year prior to the expiration of the copyright.

The decision of the District Court purported to follow *Silverman* v. *Sunrise Pictures Corporation* (273 Fed., 909) decided by the Circuit Court of Appeals for the Second Circuit.

In another action involving the same copyright involved herein brought about the same time in the District Court for the Eastern District of New York and on a similar motion to dismiss the District Court, in that case, made a similar decision, and by a final decree dismissed the bill of complaint (*Fox Film Corporation* v. *Knowles, et al.*, 274. Fed., 731), which action has been also brought up for review pursuant to a writ of certiorari.

Appeals from both cases were taken to the United States Circuit Court of Appeals, and by agreement of counsel were submitted and argued simultaneously. The Circuit Court of Appeals

affirmed the said final decrees of the District Court in a memorandum decision, basing its affirmance solely upon the prior decision in *Silverman* v. *Sunrise Pictures Corporation*, supra (Record p. 29, fol. 65.)

POINT I.

Section 24 of the Copyright Act of 1909, the construction of which is involved on this appeal, permits the author in the absence of his widow or children to bequeath by will to an executor the absolute right to apply for a renewal of the copyright, and grants to the executor precedence over the next-of-kin.

There appears to be no ambiguity in Section 24 of the Copyright Law of 1909 with respect to the privilege of an author to bequeath by will to an executor the absolute right, in the absence of the other persons named in the statute, the widow or children, to apply for and obtain a renewal of the copyright. For convenience we set forth the pertinent part of Section 24:

> "That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or chil-

dren of the author, if the author be not living, or if such author, widow or widower, or children be not living, then by the author's executors, or in the absence of a will, his next-of-kin, for a further period such that the entire term shall be equal to that secured by this act including the renewal period: * * * Provided, that application for such renewal and extension shall be made to the Copyright Office and to the register therein within one year prior to the expiration of the existing term."

(Section 24 of the Copyright Act of March 5th, 1909, 35 Stats., Part 1, p. 1080.)

Considerable enlightenment of the legislative intent in enacting said section is contained in the House Committee Report, Number 2222, 60th Congress on the bill afterwards enacted into the Copyright Law of 1909. After referring generally to the wisdom of a renewal of the term of a copyright, the report reads:

"It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right." * * *

"Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the

> widow, widower, or children of the author, if the author, be not living, or if such author, widow, widower, or children be not living, *then the author's executors, or in the absence of a will, his next-of-kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.*" (Italics ours.)

Under the clear and unequivocal provisions of the Act and the further explanation by the above Committee Report it is almost incomprehensible how the Circuit Court of Appeals could interpret this statute by reading into the Act any condition or qualification of the absolute privilege of an author in the absence of his widow or children to bequeath by will the right to his executors to make an application for a renewal of the copyright.

The instant case disclosed a situation where this plain and simple construction should have been followed, as was alleged in the bill of complaint. The original copyright procured by Harper & Bro. expired in 1901. The author properly procured a renewal thereof from 1901 to 1915. The author died in 1912 without a widow or children, leaving as his executor and sole legatee one Norman E. Goodrich. The executor duly qualified and as such executor, within a year prior to the expiration of Will Carleton's copyright in 1915, duly made his application for a renewal thereof, and the Register of Copyrights registered such renewal from 1915 to 1929. By operation of law the said executor, who was also the sole legatee, received the benefit of such further renewal copyright, and

when he died on July 27, 1915, he had the absolute right to bequeath by will his property, which included the said renewal, to his widow Alice L. Goodrich, from whom the petitioner received its title to the dramatic copyright by an assignment duly executed on October 26, 1920. The chain of title is perfect and complete, and in accordance with the only possible construction of Section 24 of the Act, the petitioner, acquired by assignment, the renewal of the copyright which expires on February 21, 1929. The Bill of Complaint therefore alleges a good cause of action and it was error to dismiss the same.

POINT II.

The proposition of law upon which the instant case was decided, and as also contained in the case of *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed., 909, to wit: "That the right or duty of an executor to make an application for the renewal of a copyright exists only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease," is unsound and is not in accordance with the legislative intent.

The decision holding the renewal copyright invalid in the case at bar is based upon the

proposition held by the District Court and the Circuit Court of Appeals in the case at bar and in the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* to the effect that in the absence of the author's widow or children, the executor has no right to make an application for a renewal unless the power or privilege of obtaining such renewal was in existence in the testator-author at the moment of decease; that is to say, the author must have died within one year prior to the expiration of his or the prior copyright.

We have been unable to find any authority, nor do we believe there is any adjudicated case, with the exception of the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* and the instant case, construing the act in any such manner.

Prior to 1831 in the various copyright acts then in force the right of renewal was given to an author, his executors, administrators, and assigns, and under the specific language of those statutes it was determined in the case of *Paige* v. *Banks,* 13 Wall. (80 U. S., 608), that an author who had assigned all his right, title and interest in and to a literary property thereby also impliedly assigned the right of renewal.

In 1831 the law was amended by eliminating the word "Assigns" from the statute and making the provision with respect to the renewal of copyrights substantially the same as contained in Section 24 of the present Copyright Act of 1909.

The case of *White-Smith Music Publishing Co.* v. *Goff,* 187 Fed., 247, affirming 180 Fed., 256 decided in 1911, and construing Section 24 of the Copyright Act of 1909, we believe correctly held that the case of *Paige* v. *Banks, supra,* was no longer applicable to the present statute and such

case established the proposition that an author or composer by assigning all his rights in and to a musical or literary work did not and could not assign the right of renewal; that such renewal right was *eo nomine* and limited strictly to the persons mentioned in the statute. In its discussion of Section 24 the Court gives a careful, learned and exhaustive opinion with reference to the general purport and effect of the renewal provisions of the Act, and in discussing the rights of executors under said statute says as follows (p. 251):

> "In every Act since that of 1831 this method of vesting the right to an extension *eo nomine* has been persisted in. The purpose of these provisions is singularly illustrated by the fact that all the author's administrators are shut out; but his executors who he may appoint at his will are let in."

That case, we believe, correctly establishes in theory at least that the renewal of a copyright is not truly an extension of an existing right, but is the creation of a new right derived only from the statutes and limited to the persons mentioned therein and in their order, providing proper application is made by the persons entitled to same for such renewal. No limitations or conditions are mentioned therein as to the right of executors to make application for a renewal of a copyright in the absence of the author's widow or children, and it would appear from that decision, although the precise quesiton was not adjudicated, that if there were no widow or children the executor, being the next

person mentioned in the statute, would have the absolute prior right to apply for such renewal and obtain the benefits thereof necessarily in trust for the legatees named in the author's will.

It is difficult to understand how the learned District Court and the learned Circuit Court of Appeals in the instant case and in the case of *Silverman* vs. *Sunrise Pictures Corporation, supra,* established the proposition that an executor could not make an application for a renewal of the copyright unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of his decease, *i. e.*, that it was dependent on the accident of the time of the author's death.

The facts in the *Silverman case* were entirely different from the facts in the instant case. In the *Silverman case* no application was made by the executor for a renewal of the copyright within the year prior to the expiration of the author's copyright. He had been discharged and ceased to function and had failed to make such application. An application, however, was made within the year prior to the expiration of the copyright by some of the next-of-kin and the learned Circuit Court of Appeals in the *Silverman case* held that the next-of-kin had obtained a valid copyright.

We are not concerned with any of the propositions discussed and litigated in the *Silverman case* except in one proposition stated by the Court to be as follows at page 913:

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privi-

> lege of obtaining renewal was existing in the testator-author at the moment of decease."

This proposition was followed by the learned Circuit Court of Appeals in its affirmance of the decree of the District Court in the instant case.

It is very difficult to follow the reasoning of the learned Circuit Court of Appeals in arriving at this interpretation of the statute. It is submitted that there is nothing in the act or in the design or purpose thereof as expressed by the report of the Committee of the House of Representatives heretofore set forth or in the case of *White-Smith Music Publishing Co.* v. *Goff*, *supra*, interpreting generally said statute, to warrant, we believe, any such interpretation with respect to the rights of executors to apply for a renewal of a copyright.

That a misapprehension and confusion of the entire subject has arisen, is evidenced by the following excerpts from the opinion of the learned Circuit Court of Appeals in the *Silverman case*. The Court, at page 913, says:

> "It is plain from the language of the Act and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated— a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right ***eo nomine***, which is

exactly what the statute was designed to prevent."

The Court in that paragraph was discussing only the absolute rights of the widow or children to apply for a renewal of the copyright and that the author could not grant to his publisher the right to obtain the renewal and thereby deprive his widow or children of that right. No mention is made of the author's executors and up to this point the law expressed therein is undoubtedly correct, because in any event in accordance with the statute, if there were a widow or children, the executor would never have any right to renew a copyright. The Court then continuing in its opinion, says, on page 913:

"But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

"If however, the author lives to within the statutory year he may certainly exercise his right, assign it or bequeath it; and if he dies in the year, but before registration, it is for his executors to function. They would receive the renewal as do the executors of an inventor dying after application and before issue of patent, who, 'in the absence of context to the contrary' take 'in trust for the next of kin' (*De La Vergne & Co.* v. *Featherstone*, 147 U. S., at 222.) In this case had Mrs. Wilson died within the year her executors would have found 'con-

> text to the contrary', and would have acquired copyright for the residuary legatees as such."

We think that the comparison stated by the Court between the rights which may not be assigned under Section 24 of the Copyright Law and the rights that may be bequeathed are not correctly placed on the same level, nor are they at all comparable. While it is true "What may be assigned can ordinarily be devised", it does not necessarily follow that the rights are governed by the same procedure or principles. In other words, while it is true that provision for the assignment of a renewal term has been specifically excluded from the present statute before the right to accrual of the renewal estate yet this statute specifically permits the author to bequeath the right to make application for the renewal term, provided that no widow or children survive. The learned Circuit Court of Appeals in construing the statute in the *Silverman case* treated executors as though they were not specifically mentioned in the statute or as though they had been specifically excluded in the same manner that "Assigns" had previously been stricken from the Act of 1831, and the subsequent acts.

In view of the fact, however, that the statute specifically provides that the right to renewal may be bequeathed to executors necessarily to be held in trust for the benefit of the legatees, and inasmuch as the statute gives such executor precedence over the next of kin, there seems to be no reason why the learned Circuit Court of Appeals should strip the executors of the specific rights granted by the statute, except upon the

happening of an event not named in the statute, that is, the death of the author within one year prior to expiration of his copyright.

POINT III.

The comparison by the Circuit Court of Appeals in the *Silverman case* to the granting of a patent to the executor or administrator after application for a patent has been made is not at all similar to the situation in the instant case.

The comparison by the Circuit Court of Appeals to the patent laws is in no sense analogous. The Court refers to the case of *De La Vergne Co.* vs. *Featherstone,* 147 U. S., 222.

In that case an entirely different situation existed. It is provided by Section 4896 of the Revised Statutes that whenever a person makes application for letters patent and dies before their issuance, as follows:

> "When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the

heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath of affirmation required to be made shall be so varied in form that it can be made by them."

Under this section, and which was the one referred to in the case of *De La Vergne* v. *Featherstone, supra,* if the inventor dies before his letters patent are granted his executors or administrators may obtain the final letters patent. The right of the executors or administrators to succeed the inventor in trust for the heirs at law in the event of his death, pending grant of letters patent, is specifically granted by the Patent Laws, and in that respect the Courts strictly and religiously adhere to the language of the statute. In the case at bar and in *Silverman* vs. *Sunrise Pictures Corporation, supra,* in spite of the fact that the statute grants rights to executors to apply for a renewal the Circuit Court of Appeals has made an interpretation which entirely eliminates the statutory intent.

POINT IV.

If the interpretation in the instant case and *Silverman case* is correct with reference to the executor's right to obtain a renewal, the same interpretation should be made with respect to the other persons and classes mentioned in the statute.

If the proposition advanced in the *Silverman case* and in the instant case with reference to executors must be followed, to wit, that the right to apply for a renewal of the copyright exists only when the author died within one year prior to the expiration of his copyright, then the rule must be similarly and consistently applied to the widow and children and next of kin of the author; otherwise the entire structure falls. If the executor has no capacity to apply for the renewal term unless that right came into being and was in existence at the time of the death of the testator, then it must equally follow that the widow and children could not apply for the renewal term unless the decedent likewise died within one year prior to the expiration of the original copyright term, and similar reasoning should certainly apply to the next-of-kin, because they are the last class mentioned in the statute and their rights are only to be asserted under the statute in the absence of all the other classes surviving the author.

The reasons for the decision in the *Silverman case* and in the present case that executors do not acquire any renewal rignts until the beginning of the year last preceding the expiration of the copyright, either apply with equal force to the widow and children of the author and prevent these classes of persons from acquiring any renewal rights unless through the accident of the author's death within the prescribed year; or the reasons for these decisions are not sufficient to deprive executors situated as in the present case, of these rights. In the *Silverman case* the court said:

> "• • • We construe the section as vesting the right in, or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

If this be true of executors it is equally true of the widow of the author or his children. The court then continues:

> "It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary absence of a will in respect of this right, which only came into existence some five years after the testatrix died."

If this renewal right is not capable of passing by will to the executors unless within the prescribed year, neither does it pass to the widow or the children of the author, and it follows that these persons likewise have no rights unless death occurs within a year prior to the expira-

tion of the copyright. In spite of this fact, however, the court bases its decision that a testator-author cannot devise his renewal rights unless within the prescribed year upon the reason, quoted again from the *Silverman case* that:

> "The author cannot take away the rights of widow, children, before the opening of the last year of original copyright."

Logically, as seen above, this argument is without force for the reason that widow and children, being on a par in the wording of the statute with executors, have no greater rights than executors have within the meaning of this decision until the beginning of the prescribed year. If, to these arguments, it be answered that the widow and children receive the right to renewal not in any way through the author but by a pure statutory grant upon the beginning of the year, it may be answered that executors being enumerated with widows and children in the statute, likewise receive the renewal rights at the prescribed time, the only condition being that the widow and children are preferred in their order. The decision in the *Silverman case* and in the present case, in the end, comes to this:

> (1) Either, executors along with the widows and children of authors have an inchoate right to renewal upon the death of the author, which right, however, can only be exercised at the beginning of the prescribed year, or;
>
> (2) Executors as well as the other classes enumerated receive renewal rights by statutory grant at the beginning of the year prior to the expiration of the copyright, or;

(3) Congress, in its zeal to secure to authors, their widows, and children the benefit of renewal rights, has enacted a statute which will operate to deprive them entirely of these rights unless upon the accident of the author dying within the year preceding the expiration of the copyright.

It follows logically from the above that the only proper construction of Sec. 24 of the Copyright Act is that which, following the plain language of the statute itself, gives to widows and children of authors, or if they are not living, to the executor of the author a renewal right at the time of his death, even though by a proviso in Section 24, this right cannot be exercised until the beginning of the year previous to the expiration of the copyright.

POINT V.

It is respectfully submitted that the correct interpretation of Section 24 of the Copyright Act requires a reversal of the decree of the Circuit Court of Appeals and the District Court dismissing the bill of complaint; that such decrees be set aside and vacated with costs.

Respectfully submitted,

SAUL E. ROGERS,
Attorney for Petitioner.

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Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION,
Petitioner,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,
Respondents.

October Term, 1922
No. 310

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

LOUIS R. BICK,
Solicitor for Respondent.

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To be argued by
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RESPONDENTS' BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court from an order of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Eastern District of New York, dismissing the petitioner's bill of complaint upon a motion to dismiss under Equity Rule 29 in an action for infringement of a copyright.

Statement.

The bill of complaint alleges that prior to February 1st, 1873, one Will Carleton wrote a series of poems entitled "Farm Ballads", which contained among other things two certain poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse" (Rec., p. 1, fol. 3).

That prior to the 21st day of February, 1873, Will Carleton assigned said series of poems entitled "Farm Ballads" including the two poems aforementioned and his literary properties therein, including all his rights therein and the right to secure copyright therefor, to Harper & Bros.

That on or about the 21st day of February, 1873, Harper & Bros. copyrighted the two poems aforementioned (Rec., p. 2, fols. 3-5).

That within one year before the expiration of the copyright obtained by Harper & Bros. and on the 7th day of January, 1901, Will Carleton filed an application with the Register of copyrights for the renewal of said copyright, and on the 7th day of January, 1901, said copyright was renewed from the 21st day of February, 1901, for a period of fourteen years to and including February 21st, 1915 (Rec., pp. 2-3, fol. 5).

That prior to the expiration of this renewal period and in 1912, *Will Carleton died leaving a will naming Norman E. Goodrich as his sole legatee and nominating him as his executor* (Rec. p. 3, fol. 6).

That within one year before the expiration of the renewal of this copyright, heretofore obtained by Will Carleton, and *three years after the death*

of Will Carleton, Norman E. Goodrich as executor and sole legatee of the Estate of Will Carleton on or about the 21st day of February, 1915, *filed an application for the renewal of said copyright of the said copyright and the said copyright was again renewed from February 21st,* 1915, *for a further period of fourteen years to and including the 21st day of February,* 1929 (Rec., p. 3, fol. 6).

That thereafter and in July, 1915, Norman E. Goodrich died leaving a will in which he made Alice L. Goodrich, his wife, his sole legatee and nominated her as his executrix.

That on the 20th day of October, 1920, Alice L. Goodrich as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, executed what purported to be an assignment to this petitioner of the sole dramatic copyright of the said poems and by said instrument attempted to give to this petitioner the exclusive right to dramatize the same for production on the stage throughout the world (Rec., p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

The bill further alleges that after the assignment to this petitioner, the defendant Knowles wrote a drama entitled "Over the Hills to the Poorhouse", which tells the story as is related in the poems aforementioned with certain additions, elaborations and modifications and that the other defendants gave public exhibitions thereof without the petitioner's consent and for which alleged infringement petitioner asks for an injunction together with an accounting for profits and damages.

The respondent made a motion to dismiss the bill of complaint pursuant to equity rule No. 29 on the ground that the bill of complaint did not set forth a cause of action.

The District Court dismissed the bill and in its opinion (274 Fed. 731) held in effect among other things, that Will Carleton having died in 1912, three years prior to the expiration of the copyright term, that Norman E. Goodrich, his executor, had no right in 1915 to apply for or secure a renewal of the copyright, and followed the decision in the case of *Silverman* vs. *Sunrise Pictures Co.*, 273 Fed. 909, which held that the opening of the last year of the original copyright, the author could not bequeath the right to apply or secure the renewal or extension of the original copyright. The District Court reached the conclusion:

> "The author, Will Carleton, at his decease had no rights which he could dispose of in the old copyright which he had assigned. He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived. The power to renewal apparently vested in his next of kin and was not exercised and no valid copyright for the renewal period now exists."

The Circuit Court of Appeals affirmed the decree of the District Court dismissing the bill on its opinion rendered in *Silverman* vs. *Sunrise Pictures Co.*, *supra* (Rec., p. 26, fol. 60).

POINT I.

The complainant has no valid copyright.

The question, to be determined on this appeal, is, has the petitioner a valid copyright? Respondents contend it has not.

Section 24 of the Copyright Law reads:

> "That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor hereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

In the case at bar Carleton died in 1912, *three years prior to the expiration of the copyright* leaving a will naming Norman E. Goodrich as sole legatee and Executor. In February, 1915, three years after the death of the author, Goodrich, as sole legatee and as Executor, applied for and secured a renewal of the copyright.

Assuming that Norman E. Goodrich as legatee of the author Carleton acquired title to the copyright then existing at the time of Carleton's death, he did not acquire any right of renewal thereof for the reason stated by Judge Hough speaking for the Circuit Court of Appeals in the Silverman case, supra.

> "The author cannot take away the rights of the widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright.
>
> But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

And as Judge Knox said in the case of *Fox Film* vs. *Knowles*, 275 Fed. 852:

> "As it was with Mrs. Wilson, so it was with Will Carleton—he died before the open-

ing of year within which the renewal obtained by him could again be renewed."

The Court in the Silverman case further remarked in construing section 24:

> "We construe the section as vesting the right in, or imposing the duty on executors only when the power or privilege of obtaining renewal was existing in the testator-author, at the moment of his decease. This avoids the anomaly of requiring executors as such to do something in respect of a property right not passing by the will appointing them or capable of so passing. It is consequently held here, that since the renewal right did not exist, it was not affected by the will, or the appointment of executors, in short there was a necessary absence of a will in respect to this right, which only came into existence some five years after the testatrix died."

In the present case, *the right,* if it may be called such, *came into existence three years after the testator's death.* Therefore, when Goodrich obtained this renewal of the copyright in 1915, he did not obtain a valid copyright either as legatee or as Executor. That being so, he had nothing to bequeath to his wife, and she in turn had nothing to assign to this petitioner.

Counsel for petitioner argues that the construction placed upon this section by the District Court and the Circuit Court of Appeals is contrary to the legislative intent in the enacting of the said statute and has included in his brief excerpts from the committee reports of Congress.

There is no doubt that the amendment was designed to assist authors and to give them the benefit of the renewal of the copyright, for it often happens that an author for various reasons sells his copyright outright to a publisher for an insignificant sum and the work thereafter proves to be a valuable asset, sometimes beyond the term of the original copyright.

The copyright statute as it is now in force was enacted to enable an author or those who may be dependent upon him to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power, which may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, *a new property right is created*, not in any way dependent upon the previous benefits of the original copyright. *This new property right, however, does not come into being until the beginning of the last year of the original copyright.* Not until then has the author any estate or right which he can bequeth. The right of renewal which is a new property right therefore, was no part of the estate of Will Carleton at the time of his death, and therefore, the renewal right could not pass under his will as he did not possess the same at the time of his decease.

Petitioner argues that if our construction of the statute is correct, that Congress would not have inserted the word "Executor" in this section unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise

where the author might die *within the last year* of the copyright without having applied for a renewal and where no widow or children survived him. Under these conditions it gives the Executor the right to obtain the renewal for the benefit of the estate of the author, *as the new property right was in existence at the time of the author's death.*

Petitioner in his brief contends that its construction of the statute is in accordance with the decision in the case of *White-Smith* vs. *Goff*, 187 Fed. 247. A careful examination of the *supra* case will disclose to this court that there is no conflict between that case and the Silverman case, but rather that these two decisions are in harmony.

In the White-Smith case the action was brought by the plaintiff asserting to be the proprietor of certain copyright acquired by it from the author. Prior to the expiration of the original term of the copyright, the complainant as assignee of the author, sought to extend the copyright for a further renewal term of twenty-eight years The court in that case held that the proprietor was not entitled to the extension or renewal, as the sole right to any such extension or renewal was vested in the author, and was conditional upon his survival, such right only accruing to him within one year prior to the expiration of the original copyright term.

The court said at page 248:

> "Moreover, as is thoroughly settled by the Supreme Court, all rights of copyright in the

United States are purely statutory, whatever they may once have been in England; and it is not so easy to understand how there can be a vested right under a public statute which has not actually accrued, and which lies only in the future."

It is this proposition that was determined in the case of *Silverman* vs. *Sunrise Pictures Co., supra.* for the Court in that case held that a vested right did not accrue to the author until within one year prior to the termination of the copyright period, and that therefore, there was no estate which could be either bequeathed or devised or could it be taken by his next of kin in the event of intestacy

In the White-Smith case the Court further held that an assignment of the right of renewal made *within* one year prior to the expiration of the original term would have been valid under Section 24 of the Copyright Law. This is in harmony with the Silverman case, and with the contention made by the respondents herein, for if Will Carleton, the author, had continued to live to within one year prior to the expiration of the term of the original copyright, and had during that year either assigned or bequeathed his right to renewal, the same would have been valid. If the author had lived to within the said year, and died during the year, then his Executor would have received an Estate which would have entitled him to exercise the right to renewal.

The determination and opinion of the Courts in these two last cited cases are not inconsistent

and are in accord on the point involved in this case, both as to the legislative intent and as to the construction to be placed upon the statute.

POINT II.

It is respectfully submitted that Section 24 of the copyright Act as construed by the District Court and Circuit Court of Appeals is correct and that the decree should be affirmed with costs.

Respectfully submitted,

Louis R. Bick,
Solicitor for Respondent.

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